Filed 2/9/10 P. v. Christiansen CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. DAN VINCENT CHRISTIANSEN, Defendant and Appellant.	C058657 (Super. Ct. No. 06F7733)

A jury found defendant Dan Vincent Christiansen guilty of two counts of attempted murder of a peace officer (counts 1 and 2), two counts of assault with a firearm on a peace officer (counts 3 and 4), and one count of discharge of a firearm with gross negligence (count 5), and found he personally discharged a firearm in the commission of counts 1 through 4. The jury also found the attempted murders were deliberate and premeditated. The court sentenced defendant to 20 years plus 15 years to life in prison with the possibility of parole.

On appeal, defendant contends there was insufficient evidence to support a finding of premeditation and deliberation. He also contends the trial court erred when it denied his

request for a jury instruction on the lesser included offense of attempted voluntary manslaughter. We will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On September 22, 2006, Sheriff's Sergeant Forrest Bartell went to defendant's property to follow up on a complaint that defendant had been assaulted by a neighbor. Bartell searched for defendant and the neighbor for approximately two hours, but could not find either one. When Bartell spoke to the defendant on the telephone earlier that day, defendant's speech was slurred and he was acting "kind of irrational." Bartell had spoken with defendant on the phone several times the previous two days, and defendant seemed to be "upset with everybody."

On the evening of September 22, 2006, Katherine Warner, a friend of defendant's who lived approximately one-quarter mile away, heard three gunshots. Shortly thereafter, defendant called Warner and said, "They're going to get me" or "they're going to shoot me." He told her he thought someone was trying to kill him. Defendant sounded upset and anxious and asked Warner to call the sheriff's department, telling Warner he had attempted to call himself but "was not satisfied with the response he was getting." Warner immediately called 911.

Sheriff's Deputies Jesse Gunsauls and Marc St. Clair were dispatched to the call.[1] The deputies arrived at Warner's home

---

[1] Gunsauls had spoken with defendant by telephone two days prior when defendant reported being the victim of an assault, and spoke with him again by telephone the day before this incident.

in a marked patrol vehicle wearing sheriff's uniforms. They spoke briefly with Warner, who directed them to defendant's property.

Gunsauls and St. Clair arrived at defendant's property, a densely wooded, rural area, sometime after 9:20 p.m. As they drove down the gravel road toward defendant's property, they came upon a small travel trailer. Finding no one, they continued down the gravel road, using the vehicle's headlights and spotlights to illuminate the area. They passed under an archway and saw defendant's trailer at the end of the driveway approximately 80 yards away. Gunsauls pulled up to a pile of corrugated steel roofing material lying across the driveway and stopped approximately 40 yards from the trailer. He decided not to drive over the pile to avoid making too much noise.

St. Clair noticed that the lights in the trailer were on and there was someone inside facing them. Gunsauls put the vehicle in "park" and left the headlights on, illuminating the trailer. As soon as Gunsauls stopped the patrol vehicle, the lights in the trailer went off. Gunsauls and St. Clair started out of the truck when they both heard a popping sound consistent with a gunshot from a small-caliber weapon coming from the direction of the residence. St. Clair notified dispatch that shots had been fired, then grabbed the shotgun from the patrol vehicle and took a position on the driver's side of the vehicle. Gunsauls got out, removed his sidearm from its holster, and positioned himself behind the open passenger door.

Gunsauls heard a male voice yelling and cussing, telling them to "get off of the property." Gunsauls yelled, "Hey, Dan, it's the sheriff's office, can you put down your gun?" Defendant continued to yell and cuss angrily. Although Gunsauls could not see defendant, he could tell defendant's voice was coming from the direction of the residence. Defendant said he did not believe they were with the sheriff's department and told them to get off of his property. At Gunsauls's instruction, St. Clair turned the vehicle's flashing red and blue overhead lights on for approximately 10 seconds to better identify them as law enforcement officers. Gunsauls reiterated that he was from the sheriff's department and that they were responding to defendant's request for help. Gunsauls told defendant several times to put his gun down and come out to talk. Defendant refused, telling Gunsauls to put down his gun and show himself. When Gunsauls refused, defendant said, "[W]hy not? You got a vest on. [¶] . . . [¶] . . . I got a slug for you, too." Gunsauls heard the sound of a shotgun racking (i.e., moving the shell from the magazine to the firing chamber) coming from the direction of the trailer. Moments later, Gunsauls heard three gunshots fired simultaneously from a shotgun coming from the direction of defendant's voice, followed by the sound of bullets "swishing" by his head and hitting the vegetation next to him. Gunsauls ducked, reached for the radio and advised dispatch that shots had been fired, and then met St. Clair at the rear of the patrol vehicle for better cover. Fearing for their safety, the deputies decided to leave. They quietly got back into the

truck. Gunsauls backed out of the driveway and sped toward the main road, where they parked facing defendant's property, illuminating the driveway with their headlights. Gunsauls took a rifle from the truck and he and St. Clair positioned themselves in a prone position on a small knoll facing defendant's driveway and waited for backup.

Other officers began to arrive at the scene, including Bartell, sheriff's deputies, a hostage negotiation team, members of the SWAT team, California Highway Patrol officers, and officers from the Department of Fish and Game. Some of the SWAT team members positioned themselves close to defendant's home. While Bartell and the others waited for additional SWAT team members to arrive, four more shots were fired from the direction of defendant's property.

At approximately 10:39 p.m., defendant left two voicemail messages for Michelle Hergert, whose boyfriend had done some work for defendant. The second message said, "I'm shooting at the cops tonight and I'm gonna shoot at you tomorrow night. Okay. Thank you."

During the next several hours, when the lights in the trailer were on, defendant could be seen moving about the trailer. At one point, defendant was standing in front of the living room window "flipping the SWAT team off." Defendant also made numerous telephone calls to the dispatch operator. Defendant told dispatch, "The cops are trying to kill me . . . I want the Highway Patrol, I want a chopper up here 'cause I want some light and I ain't fucking giving up until these

motherfuckers show themselves. They're afraid, they're a bunch of fuckin' wimp-ass motherfuckers and get out of their car and walk up and talk to me . . . , so get a fuckin' chopper!" During another call, defendant repeated his request for a CHP helicopter to fly over his home, telling dispatch, "I don't trust your fuckin' cops. They're a bunch of fuckin' wimps and I want a Highway Patrol 'copter that'll light up the scene so I can see 'em. I can't see . . . ."

SWAT team members and hostage negotiators continued to encourage defendant to surrender, to no avail. At approximately 3:45 a.m., Bartell drove an armored vehicle up to defendant's trailer. After hours of trying unsuccessfully to negotiate with defendant, SWAT deputies finally deployed teargas, at which point defendant came out of the trailer and was immediately taken into custody.

Deputies searched defendant's trailer and found a .50-caliber black powder rifle in the living room, and a pump-action shotgun wrapped in a flannel blanket in the bedroom. The shotgun had two live rounds in the magazine and one live round in the chamber. The words "for cops" were written in black pen on all three shells. Deputies found six expended shotgun shells lying on the ground. No smaller-caliber casings were found.[2]

---

[2] Bartell testified that a small-caliber revolver would not leave a spent casing, as the casing would remain in the cylinder.

Forensics later identified a palm print on the shotgun as that of defendant.

Defendant was charged with two counts of attempted murder of a peace officer (Pen. Code, §§ 187, 664), two counts of assault with a firearm on a peace officer (Pen. Code, § 245, subd. (d)(1)) and one count of discharge of a firearm with gross negligence (Pen. Code, § 246.3). It was specially alleged that defendant personally discharged a firearm (Pen. Code, § 12022.53, subd. (a)), and that the attempted murders were committed willfully, deliberately, and with premeditation within the meaning of Penal Code section 664, subdivision (a).

The jury found defendant guilty on all counts and found the special allegations true. The court sentenced defendant to a determinate term of 20 years plus an indeterminate term of 15 years to life in state prison.

Defendant filed a timely notice of appeal.

DISCUSSION

I

Evidence of Premeditation and Deliberation

Defendant contends that, under the guidelines set forth in *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), there was insufficient evidence to support a finding of premeditation and deliberation, thus requiring that the premeditation allegation be stricken and the conviction for premeditated attempted murder be reduced to simple attempted murder. Contrary to that claim, there was substantial evidence that the attempted murders were premeditated and deliberate.

In *Anderson*, the California Supreme Court articulated three factors to consider in assessing the sufficiency of evidence to prove that a murder was premeditated and deliberate: (1) planning activity, (2) motive, and (3) manner of killing. (*Anderson, supra*, 70 Cal.2d at pp. 24-31; *People v. Perez* (1992) 2 Cal.4th 1117, 1125 (*Perez*).) However, "*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive." (*People v. Pride* (1992) 3 Cal.4th 195, 247; see also *People v. Stitely* (2005) 35 Cal.4th 514, 543.) "The *Anderson* analysis was intended only as a framework to aid in appellate review; it did not propose to define the elements of first degree murder or alter the substantive law of murder in any way." (*Perez, supra*, 2 Cal.4th at p. 1125.)

In assessing the evidence, we view the facts in the light most favorable to the judgment, drawing all reasonable inferences in support of the jury's finding of premeditation and deliberation. (*Perez, supra*, 2 Cal.4th at p. 1124.)

Here, when viewing the evidence most favorable to the judgment, including all reasonable inferences therefrom, we find that it amply supports the finding of premeditation and deliberation.

Prior Planning

On the day of the incident, Warner heard what sounded like three gunshots. Within approximately 15 minutes, she received a call from defendant, who told her he thought someone was trying

to kill him and wanted Warner to call the sheriff's department because the response defendant was getting was unsatisfactory.

When Gunsauls and St. Clair pulled up to defendant's home shortly after the 911 call, defendant immediately turned the lights out in his trailer. As the uniformed deputies started to get out of the marked patrol vehicle, a small-caliber weapon was fired from the direction of the trailer. Defendant asked Warner to summon the sheriff's department; yet, despite the deputies verbally identifying themselves and turning on the vehicle's overhead red and blue flashing lights, defendant claimed not to believe them, tried to coax them into the open, told them he had a "slug" for them, and fired three gunshots over their heads. Defendant's prior planning is further evidenced by the three live shells (one in the firing chamber and two in the magazine) inscribed with the words "for cops" found in the shotgun bearing defendant's palm print.

Defendant claims the evidence does not support, and is indeed contrary to, the prosecution's theory that he made up a story to lure sheriff's deputies to his home where he waited, armed with a shotgun. Defendant argues he reported having been assaulted, he reported shots fired in his neighborhood, he was upset when he asked his neighbor to call 911 and thought someone was trying to kill him. He argues further that there was no evidence of planning because none of the expended shells found at his home had "for cops" written on them and deputies never recovered a small caliber weapon or .22-caliber shells from his property. We do not find that evidence persuasive. Given the

finding in the face of that evidence that the attempted murders were premeditated and deliberate, it appears that the jury was not persuaded either. Defendant initiated the 911 call and from that point on, his actions demonstrated that he did so in order to draw the sheriff's deputies to his property where they would be easy targets.

Defendant argues there was not enough time between the time deputies responded to the scene and heard popping sounds and the time defendant fired several rounds from his shotgun to demonstrate defendant deliberated in advance about a course of action. Not so. The process of premeditation and deliberation does not require any extended period of time. "'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

There is substantial evidence of prior planning.

Motive

There was substantial evidence of motive as well. In the days prior to the incident, defendant made a number of telephone calls to the sheriff's department to report that he had been the victim of an assault by a neighbor. He spoke with Gunsauls two days before the incident, and again the day prior to the incident. He also spoke with Bartell several times prior to the incident. The day of the incident, defendant asked Warner to call the sheriff's department because he was not satisfied with

the response he was getting. As a result of those interactions with law enforcement, defendant was "upset with everybody."

Defendant argues it would be "illogical" to infer from the evidence that he resented what he perceived to be a lack of response from law enforcement to his reports of a prior assault because he requested help regarding the assault and "continued to seek help right up to the time he heard gun shots in his neighborhood." Again, we are not persuaded.

From the evidence, it appears that defendant was indeed so unsatisfied with the sheriff's department's response (or lack thereof) to his complaints that he devised a plan to seek revenge. He asked his neighbor to summon the sheriff's department. What ensued was a six-hour standoff between defendant and law enforcement during which defendant left Hergert a telephone message bragging that he was "shooting at the cops," repeatedly expressed his contempt for the sheriff's department in telephone conversations with the dispatcher, fired on officers responding to a 911 call he himself requested, and "flipped off" members of the SWAT team.

Contrary to defendant's assertion, the jury could reasonably have found that these facts were not "illogical" given the events that took place prior to and after the shots were fired at the deputies. In any event, even in the absence of clear evidence of motive, a reviewing court will sustain a conviction "where there is 'extremely strong' evidence of prior planning activity . . . ." (*People v. Edwards* (1991) 54 Cal.3d 787, 814.)

Manner of Attempted Killing

The manner of the attempted killing also supports a finding of premeditation and deliberation. Deputies responding to defendant's call for help were directed to defendant's property where defendant was waiting in his trailer. Defendant immediately hid himself by turning out the lights when the patrol vehicle came to rest in his driveway. Defendant remained hidden and fired at the deputies as they sought what little protection they could behind the patrol vehicle. This conduct evidenced a preconceived design to kill the officers by luring them onto defendant's property in a manner that left them vulnerable to attack from an unseen assailant.

Defendant argues that the responding deputies arrived on his property without prior notification and, although defendant yelled at them to get off his property, he never approached them. This argument is disingenuous at best, given that it was defendant who requested the deputies' presence. Moreover, whether defendant approached Gunsauls or St. Clair is irrelevant, as he fired at them from wherever it was he was hidden.

Defendant argues that none of the shots he fired hit either of the deputies and there was no evidence he fired "at vital areas" of the deputies' bodies, instead firing in random fashion. That the shots did not actually hit Gunsauls or St. Clair was fortuitous. The bullets were close enough to Gunsauls's head for him to hear the "swishing" sound as they flew by and hit the vegetation directly behind him, thus belying

defendant's claim that he fired randomly and without aiming at "vital areas."

Defendant argues that he fired three times "in rapid succession," indicating that the shooting was a "rash impulsive act rather than premeditation and deliberation." The evidence suggests otherwise. Despite that the deputies had clearly identified themselves, defendant repeatedly tried to coax them from their protected positions, taunting them and telling them, "I got a slug for you, too." Three times he chambered a shell and fired at the deputies. The fact that the shots were fired one after the other does not preclude a finding of premeditation and deliberation.

There was sufficient evidence here for a trier of fact to reasonably find premeditation and deliberation in the attempted killing of the two deputies.

II

Request for Jury Instruction on Lesser Included Offense of Voluntary Manslaughter

Following an in-chambers conference,[3] the trial court denied defense counsel's request for an instruction on voluntary manslaughter, stating: "I believe we did have an agreement, and that is that the defense requested that the Court decline a proposed lesser attempted voluntary manslaughter, and given the state of the evidence, the parties agreed with respect to the

---

[3] The in-chambers hearing that preceded the court's ruling was not recorded.

general subject of lessers that the only other lesser that should be offered, and it will be given, is the lesser of a [section] 245[, subdivision] (a)(2) with regard to both Counts 3 and Count 4." In response, defense counsel stated, "In light of the Court's recitation of my request for the attempted voluntary manslaughter instruction, and the Court's refusal to give that a determination that that was not appropriate instruction, I don't have any further augmentation [*sic*] to make."

Defendant now contends the trial court erred when it denied his request to instruct the jury with the lesser included offense of attempted voluntary manslaughter because there was evidence to support a claim of imperfect self-defense.

"[I]n a murder trial, the court, on its own motion, must fully instruct on every theory of a lesser included offense, such as voluntary manslaughter, that is supported by the evidence. [Citation.] Hence, where the evidence warrants, a murder jury must hear that provocation or imperfect self-defense negates the malice necessary for murder and reduces the offense to voluntary manslaughter. By the same token, a murder defendant is not *entitled* to instructions on the lesser included offense of voluntary manslaughter if evidence of provocation or imperfect self-defense, which would support a finding 'that the offense was less than that charged,' is lacking. [Citations.]" (*People v. Rios* (2000) 23 Cal.4th 450, 463, fn. 10.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) A person is guilty of attempted murder where he or she does a direct but ineffectual

act toward the killing of a human being while harboring the specific intent to unlawfully kill a human being (i.e., express malice aforethought). (§ 21a; see also § 664.)

"'Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually*, but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter.' [Citation.]" (*People v. Randle* (2005) 35 Cal.4th 987, 995.)

A defendant is likewise deemed to have acted without malice and can be convicted of no crime greater than attempted voluntary manslaughter when the trier of fact finds that defendant did a direct but ineffectual act toward the killing of a human being because he actually, but unreasonably, believed he was in imminent danger of death or great bodily injury.

Defendant claims the evidence shows he had an actual belief that he needed to defend himself from imminent death or great bodily injury because he reported having received threats and having been assaulted and was upset and worried that "they" were out to get him. Defendant argues he did not believe Gunsauls and St. Clair were law enforcement officers because they refused to show themselves and "switched their red and blue lights on only momentarily." He claims he believed a true deputy would not need to conceal himself because he would have had the protection of a bullet-proof vest.

Contrary to defendant's claims, the evidence tends to show defendant did not actually believe he was in danger. Having contacted the sheriff's department numerous times in the days preceding the incident, defendant called his neighbor and asked her to call because he was not satisfied with the response he was getting. She immediately summoned law enforcement and two uniformed deputies in a marked patrol vehicle responded shortly thereafter. The deputies identified themselves, both verbally and by turning the overhead red and blue lights on for approximately 10 seconds, and acknowledged they had come in response to defendant's request for help. In response, defendant turned off the lights in the trailer, hid himself, yelled and taunted the deputies -- telling them he had a "slug" for them -- fired three shots at them, and then engaged in a six-hour stand-off during which he "flipped off" members of the SWAT team. Defendant expressed anger and aggression toward the deputies, not fear. His claim that he was afraid and did not believe the deputies were law enforcement officers is inconsistent with evidence of the telephone message he left for Hergert that he was "shooting at cops," and the conversations he had with the dispatcher acknowledging the presence of law enforcement. The fact that three of the live shotgun shells had the words "for cops" inscribed on them also strongly suggests defendant was not in fear of imminent harm and knew full well who was outside his home.

Defendant argues his statement that he had a "slug for you" to one of the deputies demonstrates he was "in real fear of

imminent harm." We are uncertain how that statement reflects fear, and note that the more reasonable inference to be drawn from that statement (and the one evidently drawn by the jury) was that defendant was acting aggressively towards the deputies and taunting and threatening them in order to coax them from their protected positions.

The trial court properly denied defendant's request for a jury instruction on the lesser included offense of attempted voluntary manslaughter.

Defendant claims he was prejudiced because the jury was left with an "all or nothing choice," forcing it to conclude he "had to be guilty of that which was charged." We disagree. However, even if we were to conclude otherwise, reversal would not be warranted. If the trial court improperly fails to instruct the jury on a lesser included offense in a noncapital case, reversal is not warranted unless "an examination of the entire record establishes a reasonable probability the error affected the outcome." (*People v. Joiner* (2000) 84 Cal.App.4th 946, 972.) As discussed above, there is little evidence to support defendant's claim of imperfect self-defense, and thus little evidence to support a finding of attempted voluntary manslaughter. Moreover, the evidence that defendant committed attempted murder is extremely persuasive. Any error in not instructing the jury as requested was harmless. (*People v. Watson* (1956) 46 Cal.2d 818.)

DISPOSITION

The judgment is affirmed.

SIMS, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.